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8 JACOB SILVERMAN,  
9 Plaintiff,

10 v.  
11 DORSEY LANE, et al.,  
12 Defendants.

13 Case No. 18-04510 BLF (PR)

14 **ORDER DENYING MOTION TO  
15 COMPEL; DENYING MOTION FOR  
16 SANCTIONS; GRANTING MOTION  
17 TO WITHDRAW PREVIOUS  
18 MOTION; DENYING MOTION TO  
19 AMEND; GRANTING MOTION FOR  
20 RETURN OF EXHIBITS**

21 (Docket Nos. 55, 57, 58, 63, 64)

22 Plaintiff, a California state pretrial detainee, filed a *pro se* civil rights complaint  
23 under 42 U.S.C. § 1983, against prison officials at the Humboldt County Correctional  
24 Facility (“HCCF”). The Court found the complaint, (Docket No. 1), stated cognizable  
25 claims for excessive force and failure to protect prisoner’s safety, and ordered the matter  
26 served on Defendants. (Docket No. 13.) Defendants filed a motion to dismiss the claims  
27 against them for failure to plead sufficient facts, (Docket No. 33), which the Court granted  
28 in part and denied in part: the excessive force claim against Defendant Twitchell and Ayala  
for their actions on June 24, 2018, and the deprivation of water claim were dismissed with  
prejudice for failure to state a claim; the motion was denied with respect to the failure to  
protect claim against Defendant Ayala. (Docket No. 54 at 16.) The Court ordered briefing

1 on the excessive force claim against Defendant Lane and the failure to protect claim  
2 against Defendant Ayala. (*Id.* at 16-17.)

3 The Court addresses below several pending motions in this matter.  
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5 **I. DISCUSSION**

6 **A. Motions for Order to Compel Discovery and for Sanctions**

7 On August 27, 2019, Plaintiff filed a motion for an order to compel discovery,  
8 alleging that he has “exchanged views” with defense counsel with regard to his efforts to  
9 obtain video-evidence from certain cameras at HCCF. (Docket No. 55.) Defendants filed  
10 an opposition, stating that Plaintiff submitted this motion *before* they had met and  
11 conferred on September 19, 2019, and therefore fails to satisfy Rule No. 37(a)(1). (Docket  
12 No. 59 at 3-4.) Plaintiff has filed a motion “to withdraw second motion to compel  
13 discovery,” admitting that he failed to meet and confer at that time, and requests that the  
14 Court accept his most recently filed motion to compel instead. (Docket No. 64.) The  
15 motion is GRANTED. (*Id.*) Accordingly, the first motion to compel, (Docket No. 55),  
16 shall be STRICKEN. The Court addresses Plaintiff’s most recently filed motion to compel  
17 to produce video surveillance, filed on September 25, 2019. (Docket No. 63.)

18 In opposition, Defense counsel asserts that he responded to Plaintiff’s request for  
19 video surveillance, and that he explained in a letter that some of the HCCF video  
20 surveillance cameras record while others do not and are “live feed” cameras. (Docket No.  
21 at 59 at 2.) Defense counsel states that the specific video footage that Plaintiff seeks does  
22 not exist because the cameras identified in the requests are “live feed” only and do not  
23 record. (*Id.*) Plaintiff simply does not believe defense counsel’s response, and points out  
24 that in another suit, video surveillance footage was actually produced by the HCCF from  
25 its archives.<sup>1</sup> (Docket No. 63.) The Court has reviewed counsel’s response to Plaintiff’s

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<sup>1</sup> In *Silverman v. Mendiburu, et al.*, Case No. 17-cv-01146 BLF (PR), Defendants

1 discovery request and finds it provides a sufficient response under Federal Rule of Civil  
2 Procedure 26(g)(1), as counsel certifies that “[a]fter a diligent search and reasonable  
3 inquiry, Defendants are unable to comply with the request because no such video  
4 recordings exist.” (Docket No. 59 at 17.) Accordingly, Plaintiff’s motion to compel is  
5 DENIED under Rule 37(a), as Defendants have adequately responded to Plaintiff’s  
6 discovery request.

7 Both parties move for sanctions. (Docket No. 59 at 5; Docket No. 63 at 2.) In light  
8 of Plaintiff’s request to withdraw his first motion to compel, Defendants’ motion for  
9 sanctions is DENIED. Because the Court finds Defendants’ response to Plaintiff’s  
10 discovery requests is adequate, sanctions against Defendants are not warranted.  
11 Accordingly, Plaintiff’s motion for sanctions is DENIED.

12 **B. Motion for Leave to File Amended Complaint**

13 Plaintiff filed a motion “to file an amended, new, complaint to cure previous  
14 deficiencies – with the Court’s leave” pursuant to Fed. R. Civ. P. 15(a)(1). (Docket No.  
15 57.) Specifically, Plaintiff seeks to amend the water deprivation claim which was  
16 dismissed without leave to amend. (*Id.*) The Court construes that as a motion for  
17 reconsideration of the dismissal of that claim. Plaintiff asserts that he never received any  
18 notice to cure the deficiency of that claim, and “thought it was understood all three named  
19 defendants partook in depriving plaintiff of water on July 1st 2018.” (*Id.* at 1.)

20 Federal Rule of Civil Procedure 15(a)(2) provides: “[A] party may amend its  
21 pleading only with the opposing party’s written consent or the court’s leave. The court  
22 should freely give leave when justice so requires.” Federal Rule of Civil Procedure 15(a)  
23 is to be applied liberally in favor of amendments and, in general, leave shall be freely  
24 given when justice so requires. *See Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th  
25 Cir. 1994); *cf. id.* (attempt to amend complaint requiring amendment of scheduling order

26  
27 produced video footage in that matter in support of their summary judgment motion.

1 under Fed. R. Civ. P. 16 must be based upon good cause). However, leave need not be  
2 granted where the amendment of the complaint would cause the opposing party undue  
3 prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay.  
4 *Id.*; *Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981). A district  
5 court's discretion to deny leave to amend is particularly broad where the plaintiff has  
6 previously filed an amended complaint. *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 830  
7 (9th Cir. 2003); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). A district court  
8 should deny leave to amend on futility grounds if "it appears beyond doubt that the  
9 plaintiff's proposed amended complaint would not remedy the deficiencies in the previous  
10 complaint." *Adam v. Hawaii*, 235 F.3d 1160, 1164 (9th Cir. 2001). Put differently, futility  
11 of amendment frequently means that it is not factually possible for plaintiff to amend the  
12 complaint so as to cure the deficiencies. *Schmier v. United States Court of Appeals*, 279  
13 F.3d 817, 824 (9th Cir. 2002).

14 Plaintiff asserts that he is able to cure the deficiencies of this claim if given an  
15 opportunity to do so. (Docket No. 57.) However, he has provided no allegations in this  
16 motion to indicate that an amendment would cure those deficiencies. Accordingly, the  
17 motion is DENIED. However, Plaintiff shall be granted an opportunity to file a proposed  
18 amendment to the complaint, stating sufficient facts to support a § 1983 claim based on the  
19 deprivation of water. Concurrently with the proposed amendment, Plaintiff shall file a  
20 renewed motion for leave to file an amendment to the complaint. The Court will review  
21 the proposed amendment to see if it states a cognizable claim before granting the motion  
22 for leave to amend.

23 **C. Motion for Return of Exhibits**

24 Plaintiff has filed a motion for the Court to return exhibits accompanying his  
25 amended complaint, (Docket No. 21). (Docket No. 58.) Good cause appearing, the  
26 motion shall be granted.

## II. CONCLUSION

For the forgoing reasons, the Court orders as follows:

1. Plaintiff's motion to "withdraw second motion to compel," (Docket No. 64), is **GRANTED**. Accordingly, the motion filed under Docket No. 55 shall be **STRICKEN** and terminated.

2. Plaintiff's motion to compel discovery, (Docket No. 63), is DENIED.

Plaintiff's and Defendants' motion for sanctions are DENIED.

3. Plaintiff's motion to file a new amended complaint is **DENIED** without prejudice. (Docket No. 57.) Plaintiff may file a renewed motion for leave to file an amendment to the complaint along with the proposed amendment, in which he may attempt to state sufficient facts to state a cognizable § 1983 claim based on the deprivation of water. Plaintiff is advised that no other claims will be considered. Plaintiff's renewed motion and proposed amendment shall be filed with the Court **no later than twenty-eight (28) days** from the date this order is filed.

4. Plaintiff's motion for the return of exhibits filed with his amended complaint is **GRANTED**. (Docket No. 58.) With a copy of this order to Plaintiff, the Clerk shall enclose the original exhibits filed with Plaintiff's amended complaint, (Docket No. 21). (Docket Nos. 21-2, 21-3.)

This order terminates Docket Nos. 55, 57, 58, 63, and 64.

## **IT IS SO ORDERED.**

Dated: Oct 17, 2019

  
BETH LABSON FREEMAN  
United States District Judge

**Order Addressing Pending Motions  
PRO-SE\BLF\CR.18\04510Silverman motions**